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HAROLD B. WILLEY, C

No. 386

In the

Supreme Court of the United States

October Term, 1955

INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA, A. F. L., LOCAL UNION NO. 294,
Petitioner,

v.

WESTERN FOUNDRY COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1-2
Jurisdiction	2
Questions Presented	2-3
Statutes Involved	3
Statement	3-7
Argument in Opposition to the Petition:	
I. There is No Important Question of Federal Law for Determination	7-12
II. The Case at Bar Is not One Arising Under the Laws of the United States	12-17
III. The Decision of the Court of Appeals Was Correct	18-20
IV. A Substantial Portion of Petitioner's Claim Is Otherwise Barred as a Matter of Law	20-25
Conclusion	25

Cases

Page

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U. S. 437 ..... 6, 7, 8, 10, 11, 12, 16

Bennett v. Bollinger (Georgia Court of App.), 34 S. E. 2d 563 24

De LaRama S. S. Co. v. Pierson, 9 Cir. 174 Fed. 2d 84 24

Cf. Illinois Terminal R. Co. v. Friedman, 8 Cir. 1953, 208 F. 2d 675 19

Gully v. First National Bank in Meridian, 299 U. S. 109 14

In Re Pringle Engineering and Manufacturing Co., 7 Cir. 164 Fed. 2d 209 24

Lovell v. Robert Jacobs, Inc. (Sup. Ct. N. Y. Co.), 115 N. Y. L. J. 1534 24

Mitchell v. Texas Housing Co., et al., 265 S. W. 2d 157 24

KVOS Inc. v. Associated Press (1936), 299 U. S. 269 13

Louisville & Nashville R. Co. v. Mottley (1908), 211 U. S. 149, 152 13

New Mexico College, A. M. A. v. Albuquerque Broadcasting Co., 10 Cir. 1947, 158 Fed. 2d 900 15

Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S. 667 ..... 15, 16

Smith v. Kansas City Title Co., 255 U. S. 180 15

Van Sant v. American Express Co., 3 Cir. 1948, 169 Fed. 2d 355 19

Thronateeska Pecan Co. v. Matthews, 5 Cir. 1921, 277 Fed. 361 19

Traitell v. Livingston (N. Y. Sup. Ct.), 59 N. Y. S. 2d 158 24

Page

Statutes and Regulations

Wernhardt, et al. v. Koenig, et al., 60 Fed. Supp. 709 24

Act of June 25, 1948, 62 Stat. 930, 29 U. S. C. 1331 ..... 7, 14, 15, 17, 19

Act of June 25, 1948, 62 Stat. 944, 29 U. S. C. 1653 ..... 2, 7, 18, 19

General Wage Regulation No. 1 dated January 26, 1951, secs. 1 and 5 21

General Wage Regulation No. 6 dated February 27, 1951, Sec. 1, 2(a) and Sec. 2(b) 21

General Wage Regulation No. 8 dated March 1, 1951, as amended March 8, 1951, June 30, 1951, July 30, 1951, August 23, 1951, December 6, 1951, February 6, 1952, and April 23, 1952, Section 4 ..... 22, 23

Emergency Price Control Act of 1942, 50 U. S. C. 901 24

Labor Management Relations Act, Act of June 23, 1947, 61 Stat. 136, 29 U. S. C. 141, et seq. 3

Labor Management Relations Act. 29 U. S. C. 158 (Sec. 8d, Labor Management Relations Act) 10

Labor Management Relations Act, 29 U. S. C. 185 (Sec. 301, Labor Management Relations Act) 2, 9, 12

National Defense Production Act, Act of 1950, Title IV, as amended 64 Stat. 803, 65 Stat. 134, 50 U. S. C. App. 2101, et seq. 3, 5, 6, 15, 20, 21, 23

National Labor Relations Act, Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, et seq. 3, 4

Wage Stabilization Board Procedural Regulation dated September 20, 1951, Sec. 4.4 21

Miscellaneous

Moore's Federal Practice, Volume 2, p. 1625, Section 8.07 13

Rule 8(a) (1), Federal Rules of Civil Procedure 13, 17

Art. III, Section 2, U. S. Constitution 17, 19

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v.

WESTERN FOUNDRY COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Western Foundry Company respectfully prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 17, 1955, be denied.

OPINIONS BELOW

The District Court did not render an opinion. Its Findings of Fact, Conclusions of Law and Judgment are found at R. 28-45, 70. The opinion of the Court of Appeals (R.

298) entered on March 30, 1955, is reported at 220 F. 2d 939. The per curiam opinion (R. 315) issued by the Court of Appeals on May 20, 1955, when it withdrew its prior opinion, is not reported.

JURISDICTIONS

The Judgment of the Court of Appeals was entered on May 20, 1955 (R. 316). A Petition for Rehearing duly filed by the Petitioner (R. 334) was denied on June 17, 1955 (R. 329, 334). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Does Section 301 of the Labor Management Relations Act authorize a labor union to sue an employer in the Federal District Court for the purpose of recovering wages allegedly owed by the employer to its employees represented by the union.

2. Is this suit within the jurisdiction of the Federal District Courts as a case arising under the laws of the United States.

(Question No. 3 in the Petition for Writ of Certiorari is encompassed by this question.)

3. Considering the circumstances of this case, was it an abuse of discretion for the Court of Appeals to deny the union Leave applied for under 28 U. S. C. 1653, to file an Amended Complaint to change and supplement its allegations of jurisdiction.

4. Can the union recover damages for breach of contract based upon the Company's failure to pay wages to its employees and measured by the amount of wages denied when recovery of the wages for a substantial part thereof is prohibited by Title IV of the National Defense Production Act of 1950 as amended (50 U. S. C. A. App. 2101, et seq.) and the administrative regulations promulgated thereunder.

STATUTES INVOLVED

The pertinent provisions of the Labor Management Relations Act (29 U. S. C. 141, et seq.) are set out in Appendix A, page 24 of the Petition for Certiorari. The pertinent provisions of the National Labor Relations Act, as amended (29 U. S. C. 151, et seq.), are set out in Appendix B, page 25 of the Petition for Writ of Certiorari. The pertinent provisions of the Defense Production Act of 1950 as amended (50 U. S. C. A. App. 2101, et seq.) are set out in Appendix C, page 27 of the Petition for Writ of Certiorari. The pertinent provisions of the rules and regulations of the Wage Stabilization Board are set out in Appendix D, page 29 of the Petition for Writ of Certiorari.

STATEMENT

On March 20, 1953, Petitioner filed a Complaint on behalf of certain employees of Respondent in the United States District Court for the Eastern District of Texas, Tyler Division, alleging therein:

1. That the union was the collective bargaining representative for all production and maintenance employees of the defendant, Western Foundry Company.

2. That the action arose under the Labor Management Relations Act of 1947, 61 Stat. 136, U. S. C. Title 29 Supp. IV, Section 151, et seq. (commonly referred to as Section 301, Labor Management Relations Act).

3. That on November 17, 1951, the union and the Defendant Company entered into a Collective Bargaining Agreement covering matters pertaining to hours, wages and working conditions.

4. That Article X, Section 8, of said Collective Bargaining Contract provided as follows:

> "Any increase or decrease on percentage board prices or general wage increase or decrease received by the Soil Pipe Industry generally will become effective under this agreement on the same date."

5. That on January 2, 1952, the Soil Pipe Industry generally granted a five (5) cent per hour wage increase.

6. That defendant refused to grant such increase to its employees and thereby breached the Collective Bargaining Contract.

7. That the Plaintiff Union was entitled to judgment on behalf of the employees for the amounts due and owing said employees under the Contract.

On October 21, 1953, Respondent filed its First Amended Original Answer alleging among other things:

1. That the disputed contract provision, Article X, Section 8, had been interlined by the insertion of the words "general wage increase or decrease" after execution by the

Defendant Company by its attorney and Foundry Superintendent without authority, and that the defendant had never ratified such unauthorized act of its agents and that the defendant company had immediately repudiated the interlineation upon learning of the same.

2. That the Contract contained a condition precedent, Article XIX, Section 1, that had not been satisfied, to-wit: Approval of the wages sued for by the Wage Stabilization Board.

3. That the payment of the wages sued for, or a substantial part thereof, was prohibited by Title IV of the National Defense Production Act of 1950, and regulations promulgated thereunder.

4. That the plaintiff union was guilty of laches.

The case was tried without a jury and District Judge Joe W. Sheehy, held in his Findings of Fact and Conclusion of Law, among other things, that:

1. The defendant company was bound by the contract provision contained in Article X, Section 8, as alleged.

2. That the wages involved had not been approved by the Wage Stabilization Board and that such approval was required by law.

3. That the approval by the Wage Stabilization Board was a condition precedent to defendant's liability.

4. That the lack of Wage Stabilization Board approval was not due to any conduct on the part of the defendant company.

Whereupon the District Court granted judgment in favor of the Defendant Company on the merits.

Petitioner Union appealed to the Court of Appeals for the Fifth Circuit and that Court in its Original Opinion dated March 30, 1955, reported at 220 F. 2d 939, reversed and remanded in favor of the union holding that the Contract contained an implied covenant on the part of the defendant company to cooperate and secure approval of the disputed wage increase by the Wage Stabilization Board, that the defendant company, by its conduct, had frustrated and obstructed the attempt by the plaintiff union to secure Wage Stabilization Board approval and finally, that while technically Title IV of the Defense Production Act of 1950, would prevent the Court from ordering payment of the subject wages, it could nevertheless grant damages to the union for breach of contract and the measure of those damages was the wages denied.

Subsequent to the entry of the judgment of the Court of Appeals and after the Opinion of this Court was announced in the case of *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437*, on March 28, 1955, Respondent filed a Motion for Rehearing challenging the jurisdiction of the Federal Court as well as the decision of the Court of Appeals on the merits.

Petitioner filed an opposition to Respondent's Motion for Rehearing containing argument on the jurisdictional issue and the Court of Appeals after considering Respondent's

Motion for Rehearing and Petitioner's Opposition thereto, entered its per curiam opinion dated May 20, 1955, withdrawing its previous opinion and remanding the case to the District Court with instructions to dismiss the case for lack of jurisdiction (R. 315).

The Petitioner Union thereafter filed in the Court of Appeals a Motion for Leave to File a Supplemental Complaint, together with a tendered Supplemental Complaint, and a Motion for Rehearing in which it sought leave under 28 U. S. C. 1653, to add and supplement to its allegations of jurisdiction, an allegation that the case arose under the Defense Production Act of 1950, as amended, and the Rules and Regulations promulgated thereunder for the purpose of showing that the case was one within the jurisdiction of the Federal District Courts under 28 U. S. C. 1331. On June 17, 1955, the Court of Appeals denied all of the Petitioner's Motions. (R. 329, and Order following, R. 333.)

ARGUMENT IN OPPOSITION TO THE PETITION

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW FOR DETERMINATION

Petitioner admits that the recovery of wages is prohibited in this case by Title IV of the National Defense Production Act and argues that since wages are excluded from this case, the Opinion in the *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437*, is not applicable and did not require a dismissal for want of jurisdiction.

Indeed in contrast, petitioner insists that this case involves another cause of action consisting of the breach of a contractual obligation running only to the union growing out of the same Contract and predicated upon the alleged breach of an implied covenant on the part of Respondent Company to secure approval of the disputed wage increase by the Wage Stabilization Board. Petitioner does not elaborate on this species of cause of action nor does it explain what the measure of damages would be if this is not a suit for wages or for the benefit of the employees. Would the measure of damages unique to the union be for damages to its reputation, existence, loss of majority status, etc.? Certainly, if the suit is not one for wages, Petitioner has utterly failed to adduce any evidence to show the damages it has allegedly sustained. Notwithstanding this hiatus in Petitioner's argument, it argues further that Federal substantive law governs and that this law is created by the Labor Management Relations Act, a proposition which was rejected in unmistakable terms by this Court in the *Westinghouse* case.[1]

For the reason that the instant case, Petitioner says, involves another cause of action, not includable in the concept of wages, the Rule that a union cannot sue for wages due employees announced in the *Westinghouse* case does not apply but, however, since the Westinghouse Opinion in Petitioner's interpretation suggests great uncertainty and doubt as to whether any suits for enforcement of collective

[1] Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437, 441-449.

bargaining agreements may be brought in Federal Courts, an important Federal Question is presented and any doubts or uncertainties created by such Opinion should now be clarified and resolved.

The record is conclusive as to the cause of action involved in this case. The complaint of the petitioner (R. 1-7) which alleged jurisdiction solely under Section 301, Labor Management Relations Act,[1] on page 7 thereof, further expressly alleges that a sum of money is due the employees of the Respondent, and on the same page of the Complaint, demand is then made for judgment *on behalf of the employees* (italics added) for the disputed amount. The case was tried and appealed on this theory and it was not until after dismissal of the suit for lack of jurisdiction by the Court of Appeals on May 20, 1955, subsequent to Respondent's Motion for Rehearing, which Motion was resisted by Petitioner by means of an Opposition filed thereto, that Petitioner then filed a Motion for Leave to File a Supplemental Complaint alleging the failure of Respondent to pay certain wages to be a breach of a contractual obligation owed solely to the union. The Court of Appeals apparently concluded that the Motion for Leave to Amend was without merit, improper or both, and denied the Petitioner leave to amend and at the same time denied the Petitioner's Motion for Rehearing. (R. 329, 334.)

Assume, however, for the moment, that Petitioner's proposed Supplemental Complaint was or should have been

[1] 29 U. S. C. 185 (Sec. 301, Labor Managements Relations Act) appears in Appendix A to Petition for Certiorari, R. 24.

permitted and that another cause of action was presented for determination. Does jurisdiction under Section 301, Labor Management Relations Act, exist? Petitioner argues that collective contracts must be considered as bilateral, that enforcement of rights peculiar to unions is doubtful under State Law and that Section 301, Labor Management Relations Act, when considered in connection with Section 8(d), Labor Management Relations Act,[1] provides a body of Federal substantive law for the Federal Courts to enforce. This same argument was considered and rejected by this Court in the *Westinghouse* case in these words on page 443 of that Opinion:

> "Since a statute like the Taft-Hartley Act is an organism, Section 301 must be placed in the context of the legislation as a whole. So viewed, however, the meaning which the section by itself affords is not affected. While some sections of the Act in certain instances may be revelant in actions for breach of contract and as such binding also on the State, no provisions suggest general application of defined or theretofore available Federal substantive law in actions arising under Section 301."

and on page 449 of the same Opinion, the Court concluded that Section 301 was a procedural device enacted for the purpose of eliminating the pre-existing difficulties involved in suits for and against unions as unincorporated associations in these words:

> "Legislative History in its revelant aspects thus reenforces the meaning conveyed by the Statute itself as a mere procedural provision."

[1] 29 U. S. C. 158 [see 8(a) (b) & (d)] appears in Appendix B of the Petition for Certiorari on P. 25.

It is suggested by Respondent that the question of whether or not a body of Federal Substantive Law was created by Congress in the Labor Management Relations Act has been answered in the negative by this Court in keeping with the Rule of "constitutional adjudication,"[2] regardless of what cause of action is being asserted by a union. Further, this Court expressed its Opinion in the *Westinghouse* case that the applicable substantive law is State Law.[3] And expressed serious doubt as to "the constitutionality of a grant of jurisdiction to Federal Courts over a contract governed entirely by State substantive law."[4]

Therefore, insofar as Section 301, Labor Management Relations Act, is concerned, petitioner's jurisdictional problem would not be solved even if a different cause of action other than wages was involved, particularly if such cause of action is predicated on alleged Federal substantive law which does not exist. Petitioner has not offered any new or meritorious arguments that were not heard in the *Westinghouse* case. But the Court need not actually decide the question since this is a suit for wages as the pleadings

[2]Employees of Westinghouse, supra, p. 452-453, there this Court said: "We must, of course, defer to the strong presumption—even as to such technical matters as federal jurisdiction—that Congress legislated in accordance with the Constitution. Legislation must, if possible, be given a meaning that will enable it to survive. This rule of constitutional adjudication is normally invoked to narrow what would be otherwise the natural but constitutionally dubious scope of the language. E. g., *United States v. Delaware & Hudson Co., 213 U. S. 366, United States v. Rumely, 345 U. S. 41.*"

[3]Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S., Page 459.

[4]Employees v. Westinghouse, supra, 348 U. S., Page 449.

and record demonstrates and such case falls directly under the rule of prohibition announced in the *Westinghouse* case.[1]

Respondent submits that the Federal question, if any, raised by Petitioner has been fully decided and settled by this Court and in view of Rule 19 of the Rules of this Court, no other character of reason exists for considering the Petition for Certiorari insofar as the same relates the scope of jurisdiction under Section 301, Labor Management Relations Act.

II.

THE CASE AT BAR IS NOT ONE ARISING UNDER THE LAWS OF THE UNITED STATES

In view of the action of the Court of Appeals below in denying Petitioner's Leave to File a Supplemental Complaint on Appeal, setting up an alternative cause of action for damages for breach of contract founded upon the jurisdictional grant contained in 28 U. S. C. 1331, by alleging that Petitioner's alternative claim arises under the Defense Production Act of 1950, as amended, and Regulations promulgated thereunder, this case does not involved any other jurisdictional questions other than that supplied by Section 301, Labor Management Relations Act, since plaintiff's

[1]Employees v. Westinghouse, 348 U. S. 437, 461, where Mr. Justice Frankfurter in announcing the Opinion of the Court said:

> "Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one."

Complaint upon which the suit was tried and appealed rested solely on the supposed jurisdictional grant in that Section. (R. 1-7.)

In view of Petitioner's attack, however, on the action of the Court of Appeals in denying the Petitioner the right to amend on appeal, Respondent feels obligated at this point to assume for the purpose of argument that Petitioner's Supplemental Complaint (R. 317) had been filed and to consider the question of jurisdiction which would be raised by such Supplemental Complaint. Petitioner's claim in its proposed pleading is based upon an allegation that the Respondent refused to join in a petition for Wage Stabilization Board approval and affirmatively thwarted Petitioner's attempts to obtain Wage Stabilization Board approval of the increase.

Federal Courts are courts of limited jurisdiction, therefore, it follows that a party who invokes their jurisdiction for the first time must clearly show that his action is within their jurisdiction.[1] And the doctrine is well established that jurisdiction based on a federal question or because the suit is under a Federal Law must appear in the claim well pleaded.[2]

Petitioner does not allege a violation of the National Defense Production Act of 1950, or of any of the administrative regulations promulgated thereunder, that any particular right or immunity is granted Petitioner by any

[1]Rule 8(a) (1), Federal Rules of Civil Procedure, 2 Moore Federal Practice, 1625, Section 8.07, *KVOS Inc. v. Associated Press* (1936), 299 U. S. 269.

[2]*Louisville & Nashville R. Co. v. Mottley* (1908), 211 U. S. 149, 152.

provision of such rules or regulations, that a Federal right is an essential element of its cause of action, that a "real and genuine" dispute between the parties as to the meaning of the federal laws and regulations asserted is involved, nor does it allege how Petitioner's cause of action will stand on one construction and fall on another.

To determine when a case arises under the Constitution or laws of the United States, this Court speaking through Mr. Justice Cardozo laid down these rules as follows:

> "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the Plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. Indeed, the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense.[1]"

Tested by the foregoing requirements Respondent submits that the allegations on the face of the proposed supplemental complaint failed to establish jurisdiction under 28 U. S. C. 1331.

But Petitioner argues that its contract depends for its meaning upon the construction of a federal law or regula-

[1]Gully v. First National Bank in Meridian (1936), 299 U. S. 109.

tion although it does not elaborate on the subject, and the Court is left to conjecture as to what manner of dependence is involved. Petitioner then suggests that jurisdiction under 28 U. S. C. 1331 would exist if merely some aspect of federal law is essential to Petitioner's success.

It has always been the rule that the Federal claim must not be merely colorable,[2] as it certainly appears to be from the face of the proposed complaint, and not every federal law emerging in a suit is proof that "federal question jurisdiction" exists.[3]

Any required construction of the National Defense Production Act of 1950 or the regulations thereunder in this case was due solely to the original defenses raised by Respondent in the trial court in its First Amended Original Answer (R. 11), and insisted upon by Respondent on appeal. Petitioner's proposed Supplemental Complaint must stand alone unaided by anything alleged by the Respondent in defense of the action.[4]

Petitioner has misconstrued the cases cited on page 21 of its Brief for they are certainly not applicable to the proposed Supplemental pleading Petitioner suggests. In *New Mexico College A. M. A. v. Albuquerque Broadcasting Company, 10 Cir. 1947, 158 Fed. 2d 900,* the plaintiff broadcasting company was suing for a declaratory judgment asking for a construction not only of the contract but of certain regulations of the Federal Communications Com-

[2]Smith v. Kansas City Title Co., 255 U. S. 180.
[3]Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S. 667.
[4]Skelly Oil Co. v. Phillips Petroleum Co., supra.

mission as well, and the Court of Appeals held that the asserted right and duty was clear and plain, was predicated on a right and duty flowing from the Federal Communications Act and the regulations thereunder, and that the matter involved a genuine and present controversy between the parties as to the construction of the federal laws and regulations, and that the plaintiff's cause of action in that case would be sustained by one construction and defeated by another. The petitioner in this case is not seeking declaratory relief, although if it did, other opinions of this Court would still be controlling;[1] nor has it requested the court to construe any portion of the Defense Production Act of 1950 or the regulations thereunder, nor does it show in its proposed pleading why construction of such law and regulations would be essential to petitioner's right to recover nor indeed does it show that there is any controversy between the parties as to the construction to be placed thereon as revealed by the proposed Supplemental Complaint. The only question that has ever been involved is one of fact, to-wit: Whether or not the wages sued for by Petitioner were approved by the Wage Stabilization Board.

There appears to be a suggestion in Petitioner's Brief on page 20 that in view of the restrictive scope of jurisdiction afforded by Section 301 as determined in the *Westinghouse* case, this Court should then expand the scope of "federal question jurisdiction," abandon the historical limitations of

[1]Skelly Oil Company v. Phillips Petroleum Co., 339 U. S. 667, and Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437, declaratory relief in both of these cases was denied by the Court.

the doctrine and permit unions to sue under Section 301 merely because during the process of trial, the Court may be called upon to construe a federal law regardless of whether or not such construction is essential to Petitioner's claim and whether or not there is any real controversy as to the construction of the federal law. Such a step would be a highly questionable evasion of the Constitutional limitations contained in Article III, Section 2 of our Constitution and would not be in accord with the traditional interpretation of 28 U. S. C. 1331. Certainly this possibility was fully explored in the *Westinghouse* case.[1]

Respondent respectfully submits that in this case there is no pleading of "federal question jurisdiction" of record on the part of petitioner in accordance with Rule 8(a)(1), Federal Rules of Civil Procedure,[2] which would support jurisdiction under 28 U. S. C. 1331, and that even if the proposed supplemental complaint, the filing of which was denied by the Court of Appeals, had been allowed, it would not on the very face thereof have satisfied the requirement of a federal question well plead.

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[1]See the opinion by Mr. Justice Frankfurter on Pages 449-450 of Employees v. Westinghouse, supra, where it was said:

> "2. From this conclusion inevitably emerge questions regarding the constitutionality of a grant of jurisdiction to federal courts over a contract governed entirely by state substantive law, a jurisdiction not based on diversity of citizenship yet one in which a federal court would, as in diversity cases, administer the law of the State in which it sits. The scope of allowable federal judicial power that this grant must satisfy is constitutionally defined as 'cases in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made under this authority'." Art. III, Sec. 2.

[2]Rule 8(a)(1) reads as follows: "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it * * *."

III.

THE DECISION OF THE COURT OF APPEALS WAS CORRECT

Regarding the jurisdictional issue, Respondent submits that the decision of the Court of Appeals, in dismissing the case for want of jurisdiction, was unquestionably correct for reasons already set forth.

There remains the question of the propriety and authority of the Court of Appeals to deny Petitioners the right to file a Supplemental Complaint, pursuant to the provisions of 28 U. S. C. 1653,[3] on appeal. Respondent first raised the jurisdictional question on its Motion for Rehearing filed after the Court of Appeals entered its judgment dated March 30, 1955 (R. 301-304,[4] and after this Court entered its opinion in the *Westinghouse* case on March 28, 1955. Petitioner then filed an Opposition to Respondent's Motion for Rehearing (R. 317) in which it argued the jurisdictional question, but in the face of Respondent's challenge of the Court's jurisdiction failed and avoided asking for leave to file a Supplemental Complaint. Subsequently, the Court of Appeals in its per curiam opinion dated May 20, 1955 (R. 315), withdrew its First Opinion and ordered the case dismissed for want of jurisdiction. Only after Petitioner had had an opportunity to gamble on the decision of the Court of Appeals did it decide to file a Motion for Leave to Amend setting up a new cause of

[3] 28 U. S. C. 1653 reads as follows: "Amendment of Pleadings to Show Jurisdiction. Defective allegations of jurisdiction may be amended upon terms in the trial or appellate courts. (June 25, 1948, C. 646, 1, 62 Stat. 944.)"

[4] 220 Fed. 2d 939.

action predicated on other jurisdictional grounds which Motion the Court of Appeals promptly denied. (R. 392 and 333.)

The few cases cited by Petitioner which have involved the construction of 28 U. S. C. 1653 have all involved the question of an amendment to show diversity where such diversity, in fact, existed.[1]

No cases involving a situation such as faced the Court of Appeals in this case have been discovered.

The wording of the statute appears to be written in such language that control of such amendments is left to the discretion of the Court.

There exists several reasons which would justify the Court of Appeals in exercising its discretion to deny the leave to amend. Petitioner tried and appealed his case on one jurisdictional theory and never made any effort to change its position until the Court of Appeals ruled adversely to its interest even though there was frequent and timely opportunity to amend and by having waited the Court of Appeals would be justified in treating Petitioner's action as a waiver of any right to amend. In addition, as appears in this argument elsewhere, Petitioner's proposed amended Complaint did not on the face thereof allege a "federal question case" within the jurisdictional grant of 28 U. S. C. 1331 or Article III, Section 2 of the Constitution and it would have been of no avail to Petitioner to permit the filing of such amendment.

[1]Van Sant v. Am. Express Co., 3 Cir. 1948, 169 Fed. 2d 355, Illinois Terminal R. Co. v. Friedman, 8 Cir. 1953, 208 F. 2d 675, reh, den., 210 F. 2d 229; Thronateeska Pecan Co. v. Matthews, 5 Cir. 1921, 277 Fed. 361.

It is important to note that the statute in question permits amendments of "defective allegations." By its proposed amendment the Petitioner was not curing a defect, but was, in fact, adding and supplementing its jurisdictional grounds with an entirely new cause of action predicated thereon when the issues encompassed by such alternative cause of action, based upon an obligation due solely to the union, was not considered or tried by the parties or the trial court.

IV.

A SUBSTANTIAL PORTION OF PETITIONER'S CLAIM IS OTHERWISE BARRED AS A MATTER OF LAW

Both the trial court (R. 41) and the Court of Appeals (R. 304) have heretofore held that payment of the wage increase sued for by Petitioner was never approved by the Wage Stabilization Board, and that consequently payment of such wages would be prohibited as a matter of law in view of the National Defense Production Act of 1950 (50 U. S. C. App. 210, et seq.), and the regulations promulgated thereunder. The Court of Appeals in its opinion of March 30, 1955, which was later withdrawn, concluded erroneously that despite the prohibitive restrictions of the National Defense Production Act, that the Court could nevertheless permit a recovery by allowing damages for breach of contract the measure of which would be equal to the amount of wages due and payment of which was prohibited.

Inasmuch as the lack of approval by the Wage Stabilization Board of the wage increases sued for by the Petitioner

is one of the vital defenses of the Respondent and in the light of the erroneous view already expressed by the Court of Appeals in its withdrawn opinion, it is respectfully submitted that in the event this Court should grant a Writ of Certiorari, then Respondent's question No. 4 should likewise be considered and disposed of along with the other questions raised by the Petition for the reason that this issue presents an important federal question not previously decided by this Court, the settlement of which would be proper and necessary to a full adjudication of the rights of the parties and for the further reason that the announced view of the Court of Appeals is in conflict with the decisions of other Courts on Appeal on the same matter.

General Wage Regulation No. 1,[1] promulgated by the Wage Stabilization Board, pursuant to authority granted by the National Defense Production Act, prohibited the giving of general wage increases by employers such as Respondent during the period covered by the subject contract without first securing approval of the Wage Stabilization Board. Application for such approval could be made by both union and employer jointly or by either one individually.[2] As an exception to the general scheme of wage regulation requiring prior Wage Stabilization Board approval, General Wage Regulation No. 6[3] permitted increases up to ten per cent since a certain base period begin-

[1]General Wage Regulation No. 1 appears in Appendix D., P. 29 to Petition for Certiorari.

[2]Section 4. 4(a) Wage Stabilization Board Procedural Regulation dated September 20, 1951, appears in Appendix D to Petition for Ceritiorari on P. 29.

[3]General Wage Regulation No. 6 appears in Appendix D to Petition for Certiorari, P. 30.

ning approximately January 15, 1950, and General Wage Regulation No. 8[4] permitted certain permissible increases in the absence of cost-of-living provisions without first obtaining Wage Stabilization Board approval (no cost-of-living provisions were contained in the contract between union and Respondent) by applying a formula set forth in such Regulation to certain relevant payroll data of an employer and comparing the same with the rise or decline in a cost-of-living index published by the Bureau of Labor Statistics and thereby determining the amount of the permissible increase. All possible increases under General Wage Regulation No. 6 had been exhausted and the only possible increase allowable without approval would be governed by General Wage Regulation No. 8. Evidence was heard and admitted as to the pertinent payroll data of the Respondent (R. 205),[5] and as to the Bureau of Labor Statistics Cost-of-Living Index applicable to the period covered by the contract. (R. 280, 281.)

After applying the formula described in 4(a)(i) of General Wage Regulation No. 8 (the applicable section in view of the pertinent evidence), to the payroll data of the Respondent and the Cost-of-Living Index published by the Bureau of Labor Statistics for the years, 1951-52, it ap-

[4]General Wage Regulation No. 8 appears in Appendix D, P. 31 of Petition for Certiorari.

[5]Pay raises of Western Foundry Company started in 1950:

"The wage data relating to appellee's employees shows that the hourly rated workers for whom additional wages are sought in this lawsuit were earning 85 cents per hour in 1950, were raised 10 cents per hour to a pay rate of 95 cents per hour on Oct. 23, 1950, were again raised 8 cents per hour to a pay rate of $1.03 per hour on Nov. 19, 1951, by virtue of Wage Stabilization Board Approval. (R. 205.)"

pears as a matter of mathematical calculation that a substantial portion of the wages sued for would be barred by the prohibitive effect of the pertinent regulations of the National Defense Production Act and that instead of a wage increase of five (5) cents per hour, as sued for, Petitioners, if otherwise entitled to recover, could only recover a .002 per cent of $1.03 per hour increase for the period, January 2, 1952, to August 5, 1952, and not more than 1½ per cent of $1.03 per hour increase for the period, August 15, 1952, to December 19, 1952,[1] the termination date of the Contract, since any amounts in excess of those allowable by the formula of General Wage Regulation No. 8 would require by law, approval by Wage Stabilization Board, which approval was never had or obtained.

The Court of Appeals while recognizing that lack of approval by Wage Stabilization Board as required by the appropriate statutes and regulations prohibited the recovery of wages in this case, nevertheless, held in its first Opinion on March 30, 1955 (later withdrawn), that it could grant a recovery to the Union of damages for breach of contract measured by the amount of wages that would have been due despite and in the face of the prohibition and impediment created by the National Defense Production Act of 1950.

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[1]The cost-of-living index showed a rise in cost of living from November 19, 1951, to January 2, 1952 (the date the alleged increased wages were due) of .5 points (from 188.6 to 189.1). Under Section 4 of General Wage Regulation No. 8 increases could not be made more often than each six months and the next rise of the index was on August 15, 1952, when index rose to 191.1. Thus there was a rise in the index between November 19, 1951, and August 15, 1952, of 2.5 points (188.6 to 191.1).

Percentage of increase is determined as follows:

(a) $.5 \div 188.6 = .002\%$
(b) $2.5 \div 188.6 = 1\frac{1}{2}\%$

This decision by the Court of Appeals is an incredible and unsupportable venture into legal semantics. To follow this line of reasoning would make not only this, but any similar Control Act passed by Congress easy of circumvention and as to the specific subject is in direct conflict with *De LaRama S.S. Company v. Pierson, 9 Cir., 174 Fed. 2d 84*, and *In Re Pringle Engineering and Manufacturing Company, 7 Cir., 164 Fed. 2d 299*, where both Courts held that in view of the Emergency Price Control Act of 1942 (50 U. S. C. 901), an Act much similar to the National Defense Production Act of 1950, that contracts to pay wages in excess of ceilings established by the War Labor Board pursuant to its stabilization authority, were void and unenforceable and that the Act prohibited payment of increases without approval. Other cases in the lower Federal Courts and in the State Courts support the same proposition.[1]

There is no difference in principle between enforcement of the Emergency Price Control Act of 1942 and the National Defense Production Act of 1950, insofar as the same prohibits increase of compensation without approval of the appropriate Stabilization Agency. Several cases in the State Courts in dealing with the National Defense Production Act of 1950 have arrived at such conclusion.[2]

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[1]Wernhardt, et al. v. Koenig, et al., 60 Fed. Supp. 709, Lovell v. Robert Jacobs Inc. (Supp. C. N. Y. Co.), 115 N. Y. L. J. 1534, Bennett v. Bollinger (Georgia Court of App.), 34 S. E. 2d 563, Traitell v. Livingston (N. Y. Sup. Ct., Appellate Div., 2nd Dept.) (59 N. Y. S. 2d 158).

[2]Mitchell v. Texas Housing Co., et al., 265 S. W. 2d 157, Lewton v. Fair-Tex Mills, Inc., 130 N. Y. L. J. 1436.

What the Union seeks here is compensation for employees. Since the employees would be the obvious beneficiaries of any recovery, whether such recovery be called damages or wages, payment by Respondent would still fall within the prohibition of the Control Act and recovery in excess of any sum permitted without Wage Stabilization Board approval would be barred as a matter of law.

Obviously if a Writ of Certiorari should be granted, a full adjudication of the relative rights of the parties cannot be achieved without a consideration of the prohibitive effect of the National Defense Production Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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